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December 20, 1993

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 93-107
Channel 280A
Westerville, Ohio

Dear Mr. Caton:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and eleven (11) copies of its exceptions to the Initial Decision of Administrative Law Judge Walter C. Miller, FCC 93D-22, released November 18, 1993.

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: _____
John W. Hunter

By: _____
Stephen T. Yelverton

Enclosure

B:CATON.121

No. of Copies rec'd 0+11
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of:	)	
	)	
DAVID A. RINGER	)	MM Docket No. 93-107
	)	
et al.,	)	File Nos. BPH-911230MA
	)	
Applications for Construction Permit for a New FM Station, Channel 280A, Westerville, Ohio	)	through
	)	
	)	BPH-911231MB
	)	

To: The Review Board

EXCEPTIONS TO INITIAL DECISION

Respectfully submitted,

MCNAIR & SANFORD, P.A.

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December 20, 1993

B:CATON.121

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EXCEPTIONS TO INITIAL DECISION

Introduction

1. Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Sections 1.276 and 1.277 of the Commission's Rules, hereby submits its exceptions to the Initial Decision of ALJ Walter C. Miller ("I.D."), FCC 93D-22, rel. Nov. 18, 1993, which erroneously granted the application of Shellee F. Davis ("Davis") and denied the applications of ORA, David A. Ringer ("Ringer"), ASF Broadcasting Corp. ("ASF"), and Wilburn Industries, Inc. ("WII").

Statement of the Case

2. This is a five-party comparative proceeding for a new FM broadcast construction permit to serve Westerville, Ohio. The allocation became available because the previous licensee was disqualified as a result of a renewal proceeding. See, HDO, 8 FCC Rcd 2651, para. 1 (MMB 1993).

3. Davis, Ringer, ASF, and WII propose to use the existing facilities of the defunct licensee. The tower site they propose to use is short-spaced under existing Commission Rules. Davis, Ringer, and ASF propose to use a directional antenna in order to operate at 6 kw. from a short-spaced site. WII proposes to operate at 3 kw. with a non-directional antenna. ORA proposes to use a new tower site which is fully-spaced and will operate non-directionally at 6 kw. HDO, paras. 2-11. Only ORA will provide new service to under-served areas. I.D., paras. 20-23 (findings) and paras. 8-9 (conclusions).

4. ORA proposes no integration. I.D., para. 56. It challenges the Commission's integration policy, pursuant to Bechtel v. FCC, 957 F.2d 873 (1992) and Flagstaff Broadcasting Foundation v. FCC, 979 F.2d 1566 (1992). ORA submits that its superior engineering and signal coverage proposal, which would provide new service to under-served areas, by utilization of a fully-spaced non-directional antenna operating at 6 kw., would further the Commission's comparative hearing policies and the public interest much more than the artificial and unrealistic integration proposals of the other applicants. See, ORA's proposed findings and conclusions, paras. 94-97, filed Oct. 25, 1993.

5. The I.D., paras. 47-55 (findings) and paras. 11-24 (conclusions), erroneously held that Davis is entitled to 100% integration credit and determined

her to be the qualitatively superior applicant. However, the I.D., para. 50, n. 5, n. 6, correctly questioned Davis' integration proposal because of doubts that she would actually divest a highly profitable and successful unmortgaged office equipment business which she personally manages for a mortgaged FM radio operation in which she has no experience.

6. The ALJ in Memorandum Opinion and Order, FCC 93M-614, rel. Sept. 24, 1993, erroneously denied a motion to specify a misrepresentation issue against Davis based upon her hearing testimony and exhibits. The ALJ in Memorandum Opinion and Order, FCC 93M-609, rel. Sept. 23, 1993, erroneously denied a motion to specify financial qualifications and misrepresentation issues against Davis.

7. The I.D., paras. 25-26 (findings) and para. 11 (conclusions), erroneously held that Ringer is entitled to 100% integration credit. The I.D., para. 11 (findings) and para.4 (conclusions), erroneously declined to assess Ringer a diversification demerit. The I.D., para. 33 (findings) and para. 17 (conclusions), erroneously awarded Ringer credit for auxiliary power. The I.D., paras. 27-29 (findings), correctly determined that Ringer misrepresented at the hearing matters of decisional significance, but erroneously declined to disqualify him on this basis.

8. The ALJ in Memorandum Opinion and Order, FCC 93M-639, rel. Oct. 7, 1993, erroneously denied a motion to specify a misrepresentation issue against Ringer based upon his hearing testimony and exhibits. The ALJ in Memorandum Opinion and Order, FCC 93M-602, and FCC 93M-603, rel. Sept. 22, 1993, erroneously denied motions to specify a financial qualifications issue against Ringer.

9. The I.D., paras. 7-8, 34 (findings) and para. 11 (conclusions) erroneously held that ASF is entitled to 100% integration credit. However, the I.D., para. 39, correctly questioned whether the purported non-voting shareholder, an experienced broadcaster, would preempt the purported voting shareholder as General Manger. The I.D., n. 4, further correctly found that the ASF shareholders agreement contains no restrictions on the activities of the purported non-voting shareholder, who will bear the entire cost of prosecuting

the ASF application from the hearing onward. The I.D., paras. 15, 19 (findings) and paras. 4-5 (conclusions), correctly assessed ASF a substantial diversification demerit because of the broadcast holdings of the purported non-voting shareholder, who is inadequately insulated. The I.D., para. 42 (findings) and para. 17 (conclusions), erroneously awarded ASF credit for auxiliary power.

10. The ALJ in Memorandum Opinion and Order, FCC 93M-604, rel. Sept. 22, 1993, and FCC 93M-605, rel. Sept. 22, 1993, erroneously denied motions to specify a financial qualifications issue against ASF.

11. The I.D., paras. 9, 43-44 (findings) and para. 11 (conclusions) erroneously held that WII is entitled to 100% integration credit. The I.D., para. 9, further erroneously found that a purported non-voting shareholder is not an officer of the corporation.

12. The ALJ in Memorandum Opinion and Order, FCC 93M-610, rel. Sept. 23, 1993, erroneously denied a motion to specify an EEO abuse of process issue against WII.

13. The ALJ, in Memorandum Opinion and Orders, FCC 93M-393, FCC 93M-394, FCC 93M-395, and FCC 93M-396, rel. June 24, 1993, erroneously denied motions to specify tower site availability issues against Ringer, ASF, Davis, and WII. The motions are based upon identical letters from the same person for the same site.

Summary of Arguments

14. ORA should be the preferred applicant based upon its superior engineering proposal. The Commission's integration policy is arbitrary and capricious and does not further the public interest. In any event, the integration proposals of the other competing applicants are not entitled to credit. Their integration proposals range from the strange and unnatural to the unbelievable. Moreover, those applicants are not basically qualified. None have "reasonable assurance" of the availability of a tower site. Some of the other applicants are not financially qualified and others made misrepresentations or abused Commission processes.

Questions Presented and Arguments

(a) Whether the I.D. Erred in Awarding Davis 100% Integration Credit?

15. The I.D., paras. 47-50, n. 5-6 (findings) and para. 11 (conclusions), erred in awarding Davis 100% integration credit. It failed to consider substantial record evidence which would discredit her integration proposal. Universal Camera Corp. v. NLRB, 71 S.Ct. 456, 459-466 (1951).

16. Davis is the President, manager, and owner of Britt Business Systems, Inc. ("Britt"), which is located in Columbus. She has been the owner since 1988 and personally manages the company. Britt is an office equipment dealer for Panasonic and Xerox. Since 1991, Britt has had gross yearly revenues of over $1,000,000. It has been named the number one dealer in the Mid-West. Davis attributes the success of Britt to her personal involvement. She is a hands-on manager and personally handles the largest accounts. Britt's customers include Anheuser-Busch, American Electric Power Co., Columbus Public Schools, Ohio State University, State of Ohio, Columbus Bar Assoc., and Baker & Hostetler. Davis' total compensation and profits from Britt in 1992 were about $105,000 (Davis Ex. 1, attach. A; Tr. 64-102, 376-380, 382, 418-420, 422, 425-426, 430, 439).

17. Davis has made no effort to sell Britt. No appraisal has been done as to the fair market value. If Davis could not obtain an acceptable price, she would not sell Britt. The value of Britt includes its right to sell Panasonic and Xerox equipment. These dealerships can not be sold or assigned without the prior written permission of Panasonic and Xerox. Davis has made no inquiry about obtaining consent. Britt is not encumbered with any bank loans or mortgages. The proposed Westerville station would be encumbered with a bank loan and mortgage (Ringer Exs. 5-6; Tr. 383-384, 386, 388-390, 393-396, 398-400, 420).

18. Davis first learned of the availability of the Westerville frequency in Dec. 1991. Prior to that time, she had no interest in owning or operating a radio station. She had considered going into the flower arranging or picture framing business. Reginald Davis, her husband, was previously an applicant for FM construction permits in Indianapolis, Indiana, and Upper Arlington, Ohio. He

did not have an actual intent to own and operate a radio station and received a payment in settlement of at least one of the applications. Ben Davis, her brother-in-law, had previously been an applicant for an FM permit in Huron, Ohio. He referred Shellee to his FCC counsel for her to use in the Westerville proceeding. Reginald told Shellee to do what her FCC counsel said to do. FCC counsel referred her to an engineer, found a tower site, prepared cost estimates, and prepared a form bank letter (Tr. 393, 401-406, 436-437).

19. Davis intends to lease the facilities of defunct Station WBBY-FM. She does not know the past income or operational costs for that station. Davis has never done a market analysis as to a format for her proposed station, has done no research as to its potential profitability, has made no revenue projections, does not actually know how much it would cost to operate, does not know the overall radio advertising revenues for the local market, does not know anything about the profitability of FM stations in the Columbus area, does not know anything about radio advertising revenues, and does not know anything about the economic state of radio in general. Davis does not know if she will have a salary at the proposed station (Tr. 381-382, 384-385, 387, 407-408).

20. Since deciding in Dec. 1991 to apply for the Westerville frequency, Davis has done very little to learn about the radio industry. She has read an NAB book about minority enterprises and listens more to radio. In July 1993, at the time of depositions in this proceeding, Davis first took a tour of the WBBY-FM facilities (Tr. 412, 417).

21. Accordingly, the record evidence as a whole demonstrates that Davis is not entitled to integration credit. Her integration proposal is simply not believable. Moreover, the very existence of an outside business interest renders an integration commitment questionable in the absence of additional showings by the applicant of the reliability of its integration proposal. Blancett Broadcasting Co., 17 FCC2d 227, 230, para. 7 (Rev. Bd. 1969). Applicants have the burden to establish how they will effectuate their integration proposals. Cuban-American Limited, 5 FCC Rcd 3781, 3785, para. 28 (1990). The proponent of

an integration proposal must allay any substantial doubts as to effectuating its integration proposal. Knoxville Broadcasting Corp., 103 FCC2d 669, 687 (Rev. Bd. 1986). To meet this burden, an applicant must present a detailed and convincing plan as to how it will accommodate outside business interests with its integration proposal. Naguabo Broadcasting Co., 6 FCC Rcd 912, 924, n. 63 (Rev. Bd. 1991). In order to receive integration credit, an applicant must advance a specific proposal and must establish a reasonable assurance that it will be carried out. Royce International Broadcasting, 5 FCC Rcd 7063, para. 7 (1990). In situations where an applicant proposing full-time integration has other substantial ongoing business interests, a generalized promise to reduce the time spent on a significant business interest is insufficient. Leininger-Geddes Partnership, 2 FCC Rcd 3199, para. 3 (Rev. Bd. 1987), rev. denied, 3 FCC Rcd 1181 (1988). See also, Lucinda Felicia Paulos, FCC 93R-63, para. 13, rel. Nov. 26, 1993.

22. Davis failed to meet her burden of proof as to divesting her interest in Britt. The I.D., n. 6, raises the wrong question by suggesting that there is insufficient evidence to demonstrate that Davis is fronting for her husband. The appropriate question is whether Davis has reliably demonstrated that she will actually divest her interest in Britt? Whether her husband will actually manage the Westerville station is not the issue. Davis has ample reason to retain her personal management of Britt in order to maintain its cash flow and thus devote little or time at the Westerville station. Whether her husband or someone else manages the station is irrelevant to the denial of integration credit to Davis in these circumstances. Davis has simply failed to demonstrate that she will work full-time as General Manager of the station. Nothing more need be asked.

(b) Whether the ALJ Erred in Not Specifying a Misrepresentation Issue Against Davis?

23. The ALJ, in MO&O, FCC 93M-614, erroneously denied a motion to specify a misrepresentation issue against Davis. See, ORA motion to enlarge, filed Sept. 15, 1993. Therein, ORA noted that Davis' hearing exhibit contains a declaration

under penalty of perjury, dated August 2, 1993, that she reviewed her hearing exhibit and that it is true and accurate. The exhibit contains various newspaper articles about Davis and her business, wherein she represented that Ben Davis, her brother-in-law, was a partner, shareholder, and officer in Britt. When confronted at the hearing with these representations, Davis admitted that they were not true. Davis further conceded that she gave this false and misleading information to the newspaper and knew at the time that it was not true (Davis Ex. 1, attach. B and E; Tr. 64-102, 431-434, 437, 439-445).

24. The ALJ, in MO&O, FCC 93M-614, para. 5, misses the point by concluding that it is of no significance that Davis may have mislead a newspaper reporter when being interviewed. What is of significance is that Davis included these admittedly false and misleading newspaper articles in her hearing exhibit and then under penalty of perjury swore to their truth and accuracy. Simply put, Davis placed into evidence a false jurat or affidavit and knew or should have known at the time that the jurat was false. Richardson Broadcast Group, 7 FCC Rcd 1583, 1585, para. 9 (1992), applicant disqualified based upon admission that she made false statements to the Commission. Moreover, whether Davis' false jurat, or her admittedly false statements in her hearing exhibit, otherwise have any decisional significance is irrelevant. FCC v. WOKO, 329 U.S. 223, 227 (1946), even useless and immaterial misrepresentations are disqualifying. Accordingly, this proceeding must be remanded to conduct a supplemental hearing as to Davis' basic character qualifications.

(c) Whether the ALJ Erred in Not Specifying Financial Qualifications and Misrepresentation Issues Against Davis?

25. The ALJ, in MO&O, FCC 93M-609, erred in not specifying financial qualifications and misrepresentation issues against Davis. See, WII motion to enlarge, filed Aug. 23, 1993. Therein, WII noted that it based its motion on the deposition testimony of Davis, dated July 12, 1993. In being examined about bank letters, dated Dec. 27, 1991, and March 9, 1992, from the Huntington Bank, Davis acknowledged that she had not shown or discussed a business plan or budget for

the Westerville station with the bank, had not discussed the value of the station or potential profitability, had failed to discuss what the bank's credit criteria would be, and what collateral and terms would be required. The bank letter specified as collateral station assets which would be leased. The proposed loan amount exceeds Davis' net worth and she acknowledged that she had not agreed to pledge her personal assets, if required as collateral (Dep. Tr. 50-56, 59, 206). Davis had no prior credit relationship with the Huntington Bank. The letter it provided to Davis was a form letter prepared by Davis' FCC counsel. The bank in which Davis did have a long-established credit relationship rejected her request for a loan letter because she declined to furnish information necessary to meet its credit criteria (Dep. Tr. 40-41, 44-48).

26. A substantial and material question of fact is thus raised that the Huntington letter is a mere "accommodation." Scioto Broadcasters, 5 FCC Rcd 5158, 5160, para. 12 (Rev. Bd. 1990), applicant must supply bank with sufficient information to make informed credit judgment, or there must be a relationship with bank sufficient to infer that it is thoroughly familiar with the applicant's assets, credit history, business plans, and similar data. Isis Broadcasting Group, 7 FCC Rcd 5125, 5129 (Rev. Bd. 1992), aff'd, 8 FCC Rcd 7040, n. 3 (1993), bank must be familiar with an applicant's business plan. Davis woefully fails to meet this standard. Accordingly, this proceeding must be remanded to determine if Davis is basically qualified to be a Commission licensee.

27. The rationale of the MO&O, paras. 3-6, that WII's motion against Davis is late-filed must be rejected. Neither WII, nor any of the applicants, had the right to conduct discovery as to the bank letters within 30 days after they were executed in Dec. 1991 and March 1992, or at any time prior to designation. Discovery did not commence until after designation, on May 10, 1993, with document production. The bank letters on their face did not per se raise a substantial and material question of fact as to Davis' financial qualifications. Only until Davis was deposed on July 12, 1993, did it become apparent through her testimony that the letters were merely an accommodation. The motion of WII was

timely filed within 15 after receipt of the deposition transcripts. See, Sec. 1.229 (b)(3). Even if not timely filed, the allegations against Davis raise such questions of substantial public interest importance that a remand would be required. See, Sec. 1.229 (c); Frank Digesu, 7 FCC Rcd 5459, 5461, n. 7 (1993).

(d) Whether the I.D. Erred in Awarding Ringer 100% Integration Credit?

28. The I.D., para. 11 (conclusions), erred in awarding Ringer 100% integration credit. It failed to consider substantial record evidence which would discredit Ringer's integration proposal. Universal Camera Corp. v. NLRB.

29. Ringer is the owner and full-time manager of a land development company, of which the record is virtually silent (Tr. 143, 157). Ringer did not propose in his hearing exhibit to sell this business, apparently only to somehow terminate his employment there. It is not known how many employees Ringer supervises, the precise nature of his management responsibilities, or who would assume these responsibilities. Indeed, Ringer failed to even mention in his hearing exhibit his current occupation and business (Ringer Ex. 2).

30. As previously noted with respect to the integration proposal of Davis, the very existence of an outside business renders questionable an integration commitment in the absence of additional showings by the applicant as to the reliability of its integration proposal. Blancett Broadcasting Co.; Cuban-American Limited; Knoxville Broadcasting Corp.; Naguabo Broadcasting Co.; Royce International Broadcasting; Leininger-Geddes Partnership; Lucinda Felicia Paulos.

31. Ringer's pledge to terminate his business activities, without even specifying those activities, is a vague and generalized promise no different than the ones which the Commission has consistently rejected. As held in Lucinda Felicia Paulos, para. 14, an applicant with an outside business interest is required to quantify the amount of time spent currently spent at that business and how much time will be spent there in the future. A vague promise to curtail or leave the conflicting business is too evanescent and thus legally insufficient to meet an applicant's burden of proof. Accordingly, Ringer must be denied

integration credit. He failed to advance a specific proposal to divest his current full-time occupation and business as a land developer.

32. Another independent basis exists to discredit Ringer's integration proposal. He is currently a party to a four-year non-compete agreement with AD, Inc., which ends in Oct. 1994. This company is involved in newspaper advertising and publishing free shopper guides. The non-compete agreement covers the entire state of Ohio and prohibits Ringer from competing with AD, Inc. The agreement does not clearly limit itself to newspaper or print competition. Ringer declined to produce a copy of the agreement (Tr. 150-155).

33. Accordingly, Ringer has failed to meet his burden of proof as to this issue. Cuban-American Limited, applicants have the burden of proof as to their integration proposal. The fact that Ringer is currently an owner of Station WYBZ-FM in Ohio is not determinative of whether or not he would be in violation of the non-compete agreement because he is only a minority owner and is not an employee of that station. In contrast, Ringer would be the purported controlling owner and manager of the proposed Westerville station (Ringer Exs. 2, 4).

(e) Whether the I.D. Erred in Awarding Ringer Credit for Auxiliary Power?

34. The I.D., para. 17 (conclusions), erred in awarding Ringer credit for auxiliary power. Although Ringer proposes to provide auxiliary power at his station (Ringer Ex. 3, p. 1; Tr. 44, 46-47), he failed to include auxiliary generators in his cost estimates at the time of filing his application. Such items were not included until after his July 16, 1993, deposition, when this matter was raised by opposing counsel (Tr. 145, 166-167). Accordingly, under established Commission policy, Ringer is not entitled to comparative credit for auxiliary power. Athens Broadcasting, Inc., 17 FCC2d 452, 461-462, para. 22 (Rev. Bd. 1969), auxiliary power proposal rejected where it was not included in cost estimates at time of filing, cited with approval in Linda U. Kulisky, 8 FCC Rcd 6235, 6238, n. 1 (Rev. Bd. 1993).

(f) Whether the ALJ Erred in Not Specifying a Misrepresentation Issue Against Ringer?

35. The ALJ, in MO&O, FCC 93M-639, erred in not specifying a misrepresentation issue against Ringer. See, ORA motion to enlarge, filed Sept. 15, 1993. In his application and integration statement, Ringer claimed numerous residences to be within the proposed 60 dBu contour of his station. However, in an amendment, filed July 16, 1993, Ringer conceded that all but two of these residences were not within the contour. According to Ringer in a declaration, dated July 16, 1993, he discovered the errors by reviewing the joint coverage exhibit. He made no mention of the two residences still being claimed in his hearing exhibit. These residences were at Urlin Ave. and at E. Town St. in Columbus, Ohio (Ringer Ex. 2, p. 1).

36. At the Aug. 31, 1993, hearing, Ringer again represented that these two residences in Columbus are within his proposed contour. This determination was based upon Ringer looking at a coverage map. He expressed no uncertainty. According to Ringer, if the engineer drew the contour line correctly, the two residences are within that contour (Tr. 138-140).

37. At the conclusion of Ringer's testimony, one of the applicants offered a rebuttal exhibit which shows that these two residences are at least a kilometer outside the proposed contour (Davis Ex. 5; Tr. 279-281). Ringer quickly conceded that his hearing exhibit was incorrect. His concession resulted from a call to the engineer who prepared the coverage exhibit and which took only a few minutes to conclude that Ringer was grossly in error. The I.D., para. 29, concluded that Ringer's representations are "totally false."

38. Accordingly, a substantial and material question of fact is raised that Ringer made knowing and intentional misrepresentations in his hearing exhibit that his past residences are within his proposed contour. Ringer admitted that he reviewed the joint coverage exhibit to determine whether his past residences are within the contour. Thus, his misrepresentations are knowing. An intent to deceive the Commission can be readily inferred. Two of

the competing applicants made no claim for past local residence (ASF Ex. 3; WII Ex. 2; Tr. 61). Thus, if Ringer could obtain some comparative credit for past residence, he would have a decisionally significant preference over these two applicants. See, Frank Digesu, 5460-5461, paras. 6-22, a misrepresentation issue was specified where an applicant claimed comparative credit as to matters which she knew or should have known were incorrect. There, an exaggerated claim for past broadcast experience was in issue.

39. Ringer's truthfulness and credibility are called into question by conflicting affidavits as to the reasons for his erroneous claim for past residence. In an affidavit, dated July 16, 1993, at para. 3, which was attached to an amendment of that date, Ringer explained that his failure to correctly ascertain that his residences are outside the 60 dBu contour was his belief that the contour of deleted Station WBBY-FM was to be used. However, in an affidavit, dated Sept. 27, 1993, at para. 3, Ringer conjures up a different explanation. He claims that he believed that merely a listenable signal from his station at the residences in question allowed past residence credit. Accordingly, Ringer's ever shifting and conflicting explanations raise substantial and material questions as to his credibility and thus require specification of a character issue. See, Maria M. Ochoa, 8 FCC Rcd 3135, 3136, para. 7, (1993).

40. The MO&O, paras. 4-5, erroneously concludes that Ringer's actions were inadvertent and that no deceptive intent has been shown. However, even if Ringer did not have a conscious intent to deceive, specification of an issue is nevertheless required. The Commission held in Golden Broadcasting Systems, Inc., 68 FCC2d 1099, 1106 (1978) that gross negligence and wanton carelessness are the functional equivalent to an affirmative and deliberate intent to deceive. There is no question that, at the very least, Ringer's actions in preparing and reviewing his hearing exhibit constitute such gross negligence and wanton carelessness. His claimed residences are not even close to the service contour and no reasonable person could have concluded that they were within the contour.

41. Ringer admits to gross negligence and wanton carelessness in his affidavit of Sept. 27, 1993, at paras. 3-4. Therein, he states that he "believed" that any residence which could receive a listenable signal from his proposed station qualified for past residence credit. Even after his FCC counsel disabused him of this unfounded notion, Ringer still continued to believe it. No explanation is offered for this "belief." Accordingly, if Ringer's actions do not constitute gross negligence and wanton carelessness, then nothing would.

(g) Whether the ALJ Erred in Not Specifying A Financial Qualifications Issue Against Ringer?

42. The ALJ, in MO&O, FCC 93M-602, and FCC 93M-603, erred in not specifying a financial qualifications issue against Ringer. On Aug. 18, 1993, ORA and Davis filed separate motions against Ringer which raise essentially the same matters. These motions are based upon the deposition testimony of Ringer.

43. Ringer proposes to operate his station by leasing the existing facilities of defunct Station WBBY-FM. That station operated at 3 kw. with an omni-directional antenna. Ringer proposes to operate at an equivalent 6 kw. with a directional antenna (Dep. Tr. 27, 47, 52-54, 64). However, Ringer never considered the cost of a directional antenna in determining the cost estimates for his proposed station and never made an inquiry as to how much such an antenna would cost. A written budget prepared by Ringer at the time of certification contains no reference to a directional antenna (Dep. Tr. 53-54, 76).

44. Ringer also failed to include in his cost estimates funding for programming. Although he claims that programming can be obtained free from a satellite service, no inquiry was made as to its availability (Dep. Tr. 28, 59). Another omission in Ringer's cost estimates is payroll taxes (Dep. Tr. 60).

45. Ringer stated in his application, filed Dec. 30, 1991, that his total cost estimates are $201,880. He committed $201,880 of his personal funds to meet these cost estimates. See, Ringer application.

46. Accordingly, Ringer failed to prepare complete cost estimates. This requires the specification of a financial qualifications issue. Columbus

Broadcasting Corp., 3 FCC Rcd 5480, 5481, para. 7 (MMB 1988), incomplete cost estimates raises financial issue; Dean F. Aubol, 6 FCC Rcd 4117, para. 3 (MMB 1991), where cost estimates would exceed the amount of available committed funds, a financial issue is raised; Victorson Group, Inc., 6 FCC Rcd 1697, 1700, para. 19 (Rev. Bd. 1991), vague "general sense" of cost estimates is insufficient. Commission policy would not allow Ringer to now revise his stated cost estimates without a showing of "good cause." Aspen FM, Inc., 6 FCC Rcd 1602, 1603, paras. 11-13 (1991).

47. The rationale of the MO&O, paras. 3-6, that ORA's and Davis' motions against Ringer are late-filed must be rejected. ORA and Davis had no right or even the means to conduct discovery prior to designation. The documents that Ringer produced post-designation on May 10, 1993, would not necessarily have been adequate to support a financial issue. The motions of ORA and Davis result from admissions that Ringer made at his July 16, 1993, deposition and were timely filed within 15 days after receipt of the transcript. ORA and Davis complied with Commission time limits for enlarging the issues. See, Sec. 1.229 (b)(3).

48. The conclusion of the MO&O, para. 12, that Ringer acted in "good faith" and thus no financial issue is required misses the point. The Commission standard is not "good faith," but rather strict compliance with certain requirements. The issue of "good faith" would only be relevant to misrepresentation. See, Scioto Broadcasters.

(h) Whether the I.D. Erred in Awarding ASF 100% Integration Credit?

49. The I.D., para. 11 (conclusions), erred in awarding ASF 100% integration credit. It failed to consider substantial record evidence which would discredit ASF's integration proposal. Universal Camera Corp. v. NLRB.

50. Ardeth Frizzell owns 25% of the equity of ASF and purportedly has voting control. Thomas Beauvais owns 75% of the equity and is purportedly a non-voting stockholder (ASF Ex. 1; WII Ex. 3; Tr. 50-51, 174-175).

51. Frizzell has spent most of her 20-year broadcast career in non-management employee positions. The sole exception was serving for about one year

as a caretaker General Manager of Station WBBY-FM. This was when the license revocation appeal was in its final throes (ASF Ex. 3, pp. 2-3; Tr. 50-57, 243-244). At the time the station lost its appeal and went off-the-air in Dec. 1991, Frizzell made the decision to attempt to obtain the license purportedly so that the then existing employees could be re-hired. According to Frizzell, many of the employees were in tears about the prospect of losing their jobs. The situation was very emotional (ASF Ex. 3, p. 3; Tr. 50-57, 178, 227-228).

52. Frizzell knew nothing about how to obtain the license and did not have the financial resources. She went to a friend, Joanne Adams, for help (Tr. 178-179). Adams had previously been an applicant for a new FM permit in Delaware, Ohio. She was the voting stockholder of the applicant and owned 20% of the equity. Beauvais, an experienced broadcaster, was the purported non-voting stockholder and owned 80% of the equity. Adams was awarded the permit for Delaware, but on appeal settled with the competing applicant because she had a heart condition which purportedly would prevent her from working at the station. Adams and Beauvais were paid an amount in excess of their expenses to dismiss the Delaware application (ASF Ex. 2; Tr. 50-52, 180, 246-253, 261-263).

53. Adams told Frizzell to contact Beauvais about providing financial support (Tr. 178-181, 251). They then met in Columbus on Dec. 13, 1991, on the eve of the filing deadline. This meeting lasted about one hour, including social talk (Tr. 192-193, 251). Frizzell and Beauvais only talked about the division of ownership in the application and generally about his financial backing (Tr. 196-197, 203, 251, 254).

54. Frizzell and Beauvais agreed to use the same shareholders agreement as in the Delaware application (Tr. 194-195, 197-199, 214, 239, 253, 259-261). They did not talk about the specific terms of a shareholders agreement (Tr. 196-197, 205-206); the total amount of money needed for the proposed station (Tr. 198-199, 204-205, 254-255); how the funds Beauvais provided would be used (Tr. 205); the potential profitability of the station (Tr. 201, 204, 263); a business plan or budget for the station (Tr. 199, 254-255, 265); the format of the station

(Tr. 203, 268-269); the chances of winning the permit (Tr. 269); the past financial and business history of Station WBBY-FM, which ASF intends to lease (Tr. 203-204); the salary for Frizzell as General Manager (Tr. 203-205, 269); Frizzell's past broadcast experience (Tr. 230, 269); Beauvais' business and broadcast experience (Tr. 231, 233, 238, 269); or his relationship with Adams (Tr. 231). Beauvais had never listened to the signal of Station WBBY-FM, or determined the coverage for the proposed station (Tr. 200-201, 265). He checked Frizzell's references only through Adams (Tr. 265).

55. Frizzell contacted Beauvais' FCC attorney about representing ASF. He was unable to do so because his law firm represented another applicant in the Westerville proceeding (Tr. 270-271). Adams referred Frizzell to a local attorney to prepare the corporate documents, including the shareholders agreement (Tr. 238). This agreement was signed by Frizzell and Beauvais on Dec. 23, 1991. They had not had any meetings or discussions since the 1991 meeting (Tr. 184, 192, 240). The shareholders agreement is identical to the one for the Delaware application, except for a slight difference in the division of equity (Tr. 194-195, 198-199, 214, 239).

56. Under the shareholders agreement, Frizzell is to provide $12,000 in capital contributions to ASF (WII Ex. 3, p. 3; Tr. 182-186, 210). She did not at the time of executing the agreement provide Beauvais with her personal balance sheet, or written documentation of her finances (Tr. 231, 271). Frizzell has less than $25,000 in the bank (Tr. 209-210). Under the shareholders agreement, Beauvais is to provide a total of $96,000 in capital contributions and a loan in the amount of $100,000 (WII Ex. 3, p. 3; Tr. 184-185, 187, 191, 210, 214).

57. Accordingly, the record evidence as a whole demonstrates that ASF is not entitled to integration credit. Its integration proposal is inherently incredible. As observed by the U.S. Court of Appeals, the Commission's two-tier ownership policies produce "strange and unnatural" business relationships. Bechtel v. FCC, 880. ASF may well be the strangest and the most unnatural of the lot. Frizzell's stated reason for forming ASF and applying for the Westerville

frequency is to save the jobs of the employees of now defunct Station WBBY-FM. She was moved by their tears when the station went off-the-air.

58. Beauvais, who is Frizzell's financial backer and who is an experienced broadcaster and businessman, was a virtual stranger to her at the time of organizing ASF. He purportedly agreed to provide almost $200,000 for the Westerville application and station after only a one hour meeting, which was mostly social. At this meeting, Beauvais did not inquire about the budget or business plan for the proposed station, the potential profitability, the format, the signal coverage, the total amount of money needed, how his money would be spent, the past financial and business history of Station WBBY-FM (which would be leased by ASF), the chances of winning the permit, Frizzell's financial resources, Frizzell's past broadcast experience and personal background, or Frizzell's proposed salary as General Manager.

59. It is simply unbelievable that an experienced broadcaster and businessman would agree, after a one hour meeting, to give almost $200,000 to a virtual stranger, who merely wants to save the jobs of her co-workers, and have no control over the use of his funds and ask no substantive questions about the station in which he would be investing. Metroplex Communications, Inc., 5 FCC Rcd 5610, 5611-5612, para. 13 (1990), no integration credit awarded where the application is formed in a manner irreconcilable with the exercise of sound business judgment.

60. Beauvais' seemingly irrational conduct can be explained by the fact that he had previously made a profit from financially backing another FM application for a station which was never built. The applicant in that proceeding was Adams, a friend of Frizzell's. Adams acted as an intermediary in this proceeding for Frizzell and Beauvais and told Frizzell how to go about filing and prosecuting an FM application. Adams also gave Frizzell a shareholders agreement to use in this proceeding which was used by Beauvais in the other proceeding. Accordingly, the post-formation activities by Adams in ASF

must be attributed to Beauvais and thus requires denial of integration credit. Isis Broadcasting Group, 7042, paras. 13-14.

(i) Whether the I.D. Erred in Awarding ASF Credit for Auxiliary Power?

61. The I.D., para. 17 (conclusions), erred in awarding ASF credit for auxiliary power. Although ASF proposes to provide auxiliary power at its station (ASF Ex. 4, p. 1; Tr. 51, 58), Frizzell did not budget for it in her cost estimates and did not know at the time of filing the application how much auxiliary power would cost. She first found out what the cost would be after her deposition on July 13, 1993, when the issue was raised by opposing counsel. Frizzell proposed auxiliary power in ASF's application and hearing exhibit because her FCC counsel thought it was a good idea (Tr. 242-244). Accordingly, ASF is not entitled to credit for auxiliary power. Athens Broadcasting, Inc.; Linda U. Kulinsky, auxiliary power must be included in costs estimates at time of filing the application in order to receive comparative credit.

(j) Whether the ALJ Erred in Not Specifying a Financial Qualifications Issue Against ASF?

62. The ALJ, in MO&O, FCC 93M-604 and FCC 93M-605, erred in not specifying a financial qualifications issue against ASF. See, ORA and Davis motions to enlarge, dated Aug. 20, 1993. The motions are based upon the July 13, 1993, deposition testimony of Frizzell.

63. ASF proposes to operate its station by leasing the facilities of defunct Station WBBY-FM. That station operated at 3 kw. with an omni-directional antenna. ASF proposes to operate at an equivalent 6 kw. with a directional antenna. However, Frizzell never considered the cost of a directional antenna in determining cost estimates for ASF and does not know how much such an antenna would cost. At the time of certification, Frizzell prepared no written budget or cost estimates. A written budget prepared after certification contains no reference to a directional antenna (Dep. Tr. 72-76). The proposed construction and operating budget is $90,000, which is to be funded by a $100,000 loan (Dep. Tr. 31).

64. Commission policy requires that an applicant prepare at the time of certification written documentation showing cost estimates for construction and the first three months of operation. Revision of FCC Form 301, 4 FCC Rcd 3853, 3859-3860, paras. 43, 46, 49, 52 (1989); Northampton Media Associates, 4 FCC Rcd 5517, 5519, paras. 18-19 (1989), contemporaneous documentation requirement revived and applicable to applications filed after June 26, 1989. Moreover, the failure of ASF to budget for a directional antenna renders its post-certification cost estimates incomplete and requires specification of an issue. Columbus; Aubol; Victorson. ASF can not now revise its cost estimates. Aspen.

(k) Whether the I.D. Erred in Awarding WII 100% Integration Credit?

65. The I.D., para. 11 (conclusions), erred in awarding WII 100% integration credit. It failed to consider substantial record evidence which would discredit WII's integration proposal. Universal Camera Corp. v. NLRB.

66. WII was incorporated on Dec. 27, 1991, and reorganized on Jan. 27, 1992. The corporation has no by-laws or minutes, other than one memo. Charles W. Wilburn has been issued 375 shares of voting stock. Bernard P. Wilburn has been issued 375 shares of purported non-voting stock. Charles represents that he is the sole officer and director of the corporation. However, documents on file with the State of Ohio represent that Bernard is the Secretary of the corporation (WII Ex. 1; Davis Ex. 6; Tr. 59-63, 285, 323-326, 354).

67. In order to serve as General Manager of the Westerville station, Charles proposes to terminate his current law practice and to limit any other business activities which would conflict with his duties at the station (WII Ex. 2; Tr. 59-63, 284-285). However, Charles intends to retire at age 65, which would be in April 1994 (Tr. 346).

68. Charles has been practicing general law in Circleville, Ohio, since 1963. He has engaged in or managed no other business, other than acting as a fiduciary, and has never sold advertising. Bernard, his son, joined him as a partner in 1984 (Tr. 286-287, 309, 314, 356). They each work no more than 35-40 hours per week. The law firm is a two-person partnership. They have one